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Supreme Court, U.S.
FILED
07-249 AUG 17 2007
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ANDI PALGUNADI,
Petitioner,

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When, during the pendency of the alien-petitioner's appeal to the US Court of Appeals, the I-140 Petition for Alien Worker filed on his behalf is approved and his employment visa becomes current and available thereby making him eligible to adjust status under Section 245 (i) of the Immigration and Nationality Act, may the US Court of Appeals validly deny petitioner's Motion to Remand the case back to the Immigration Court which is the only venue where he can apply for adjustment of status, or is the denial thereof tantamount to a violation of petitioner's due process rights and the clear ameliorative intent of INA § 245(i) to grant otherwise ineligible aliens the opportunity to adjust.

2. Whether or not petitioner's evidence rises to the level of past persecution and hence, should have been considered in proving his eligibility for withholding of removal notwithstanding that his application for asylum is barred under the one year bar rule.

CORPORATE DISCLOSURE STATEMENT

None of the parties are corporations. Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Andi Palgunadi ("petitioner" hereafter) prays that this Court reviews on certiorari the judgment of the United States Court of Appeals, for the Fourth Circuit, (hereinafter referred as the "US Court of Appeals") which dismissed the appeal of the petitioner from the judgment of the Board of Immigration Appeals ("BIA") affirming the decision of the Immigration Court (IC).

DECISION BELOW

The unpublished per curiam opinion of the United States Court of Appeals dismissing the Petition for Review is set forth in the Appendix at 1a to 2a. and its Order denying the Petition for Rehearing at Appendix 3a.

JURISDICTION

The judgment of the United States Court of Appeals dismissing the Petition for Review of petitioner was entered on February 12, 2007; and its Order denying the Petition for Rehearing was entered on May 22, 2007. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the US Constitution provides that: "No person shall be ... deprived of life, liberty, or property, without due process of law."

STATUTES AND REGULATIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the pertinent provisions of the following laws and regulations are set forth at Appendix 4a to 6a:

1. Sections 245 (i) and 240(c)(7) of the Immigration and Nationality Act (INA);

2. Title 28 Section 2347 of the United States Code; and

3. Title 8 Sections 245.2 and 1003.2(c)(2) of the Code of Federal Regulations.

STATEMENT OF THE CASE

Petitioner is a native and citizen of Indonesia who came to the United States (U.S.) on November 1, 1999 as a nonimmigrant vocational/non-academic student with authority to stay until October 31, 2000. Petitioner, who is married and has two children, continued to stay in the US past his authorized period of stay.

Thereafter, the Legal Immigration Family Equity (LIFE) Act was enacted, amending and extending the provisions of INA § 245(i).

Shortly thereafter, on April 30, 2001, a labor certification application was filed on petitioner's behalf by Matt Meg Exxon.

On April 25, 2003, the Immigration and Naturalization Service (INS) issued a Notice to Appear (NTA) and placed petitioner in Removal Proceedings on the ground that he has remained in the U.S. beyond October 31, 2000 without authorization.

He conceded to the charge of removability as alleged in the NTA, but sought the relief of asylum, withholding of removal and relief under Article III of the UN Convention Against Torture ("CAT").

All of petitioner's applications for relief were denied in the January 31, 2005, decision of the IC.

On March 1, 2005, the petitioner timely appealed the IC decision to the BIA.

On July 18, 2005, during the pendency of his appeal with the BIA, the labor certification application filed on petitioner's behalf by Matt Meg Exxon was approved with the

issuance of a Final Determination by the Department of Labor.

Petitioner filed a motion with the BIA to remand the case to the IC for consideration of adjustment of status pursuant to 8 CFR §§245.2(a) (2) (i)(C)(3) and 1245.2(a)(2)(i)(C)(3) as a superior relief from removal, because petitoner's priority date has become current and he has a pending I-140 petition.

However, in its Decision of May 15, 2006, the BIA denied the Motion to Remand on the ground that the said employment-based visa has yet to be adjudicated and the BIA declines to remand cases on the basis of an unadjudicated work visa. The BIA also affirmed the IC's order denying petitioner's application for asylum, withholding of removal and protection under the CAT.

On June 12, 2006, petitioner timely brought on a petition for review with the US Court of Appeals the decision of the BIA. Meantime, a stay of removal was granted by the US Court of Appeals on July 26, 2006.

On November 20, 2006, during the pendency of his appeal with the US Court of Appeals, the I-140 Immigrant Petition for Alien Worker for petitioner was approved by the INS, and shortly thereafter, became current and visa immediately available as per the December 2006 INS visa bulletin.

Thus, petitioner filed on November 29, 2006, with the US Court of Appeals a Motion to Remand Case to the IC for Consideration of Adjustment of Status alleging that:

1) Petitioner is a direct beneficiary of an I-140 Immigrant Petition for Alien Worker filed on his behalf by Matt Meg Exxon which was approved on November 20, 2006;

2) The April 30, 2001 priority date for the approved I-140 is current and visa immediately available because the Department of State is now processing August 1, 2002 for the 3Rd Category of Employment Based petition as per the

Department of State Visa Bulletin for December 2006 which he submitted as an Exhibit;

3) He is submitting his application for Adjustment of Status as a superior relief from removal under INA § 245(i); and

4) The adjustment of status was not available to the respondent at the former hearing and proceedings against him, and is material and relevant to his case as a relief from removal.

Petitioner attached to the said Motion to Remand, and submitted for filing his I-485 Application for Adjustment of Status packet together with proof of payment of the required fees.

The government filed an Opposition to the Motion to Remand on the grounds that: 1) As a fundamental principle of federal jurisprudence, the US Court of Appeals lacks jurisdiction to grant the relief requested citing 8 U.S.C § 1252(b)(4)(A) that the Court of Appeals shall decide the petition only on the administrative record on which the order is based and 8 U.S.C. § 1252(f)(2) that notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this subsection unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law; and 2) that the appropriate recourse for petitioner is to make an application to the administrative agency, the BIA, through a Motion to Reopen. However, the government contended, under 8 C.F.R. § 1003.2(c)(2) which prescribes the number of such applications and the period in which they must be made, petitioner is foreclosed from seeking relief in the BIA.

Petitioner filed a Reply to the government's opposition alleging that: 1) The US Court of Appeals has jurisdiction to remand the case and hold in abeyance the disposition thereof

under its power of judicial review to protect petitioner's rights under the due process clause of the Fifth Amendment to the US Constitution; 2) petitioner is seeking the mantle of judicial protection of this court to present a superior relief from removal (adjustment of status under INA § 245(i)) which is material, relevant and was unavailable or incapable of proof during prior proceedings; and 3) the INS right to contest the merits of petitioner's application for adjustment of status is not being curtailed and waived because it may still contest the merits of respondent's case in a reopened proceeding.

In its decision rendered on February 12, 2007, the US Court of Appeals denied the Petition for Review of the BIA decision denying his applications for asylum, withholding of Removal and CAT. It also denied petitioner's Motion to Remand without stating the grounds for denial.

Petitioner filed a timely Petition for Rehearing on March 13, 2007 which was denied in the May 22, 2007 Order of the US Court of Appeals.

Hence this petition.

REASONS FOR GRANTING THE WRIT

1. The US Court of Appeals has decided, in a manner that conflicts with the constitution, law and relevant decisions of this Court, an important question of federal law that has not been, and should be settled by this Court.

Under INA § 245(i) aliens who are physically present in the US who are the beneficiaries of a petition filed before April 30, 2001, and who pay a $1000 fee, may apply for adjustment of status and the Attorney General may grant the adjustment of status if, the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and an immigrant visa is immediately available to the alien at the time the application is filed.

Petitioner entered on November 1, 1999, has an approved labor certification application filed on April 30, 2001 and an approved I-140 Immigrant Petition for Alien Worker which is now current and visa immediately available. He is an alien qualified to adjust under INA § 245(i).

That petitioner's I-140 was approved and visa became current and immediately available only when his case was on appeal with the US Court of Appeals should not disqualify petitioner from adjusting because the law does not provide a time frame when the visa should become current and available, or disqualify aliens whose removal proceedings are pending before the US Court of Appeals.

When Congress has wanted to impose special restrictions on the applications for certain categories of aliens that it has deemed eligible, or conversely to open up eligibility for aliens that were ineligible, it has done so explicitly. *Succar vs Ashcroft*, 394 F. 3d 8 (1st Cir. 2005).

Moreover, the law has a clear ameliorative intent:

> "The statutory terms of INA § 245(i) clearly extend adjustment of status to aliens living in this country without legal status. This provision of the statute was originally enacted in 1994 in order to allow individuals who would qualify for adjustment of status but for their unlawful immigration status to apply for adjustment from within this country, rather than forcing them to undertake the time, cost, and risk of leaving the country in order to apply. The amendment was extended in 1997 and again in 2000, in order to allow 'spouses, children, parents and siblings of permanent residents or U.S. citizens [to] be able to adjust their status in the U.S. and avoid needless separation from their loved ones.' See Joint Memorandum, Statement of Senator Kennedy, 146 Cong. Rec. S11850-52 (daily ed. Dec. 15, 2000). Nothing in the statutory provisions regarding adjustment of status, nor in the discussion of its purposes, suggests

that aliens who have been previously deported or removed are barred from this form of relief." *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, (9th Cir. 2004)

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

As it is, by denying his motion to remand to the IC, petitioner was left without any venue where his adjustment of status could be heard because under 8 CFR § 245.2 the application for adjustment of status of an alien in removal, may only be considered in the removal proceedings, and as pointed out by the government in its Opposition to petitioner's Motion for Remand in the US Court of Appeals, petitioner is foreclosed from seeking relief in the BIA because the period for filing a Motion to Reopen has lapsed under 8 C.F.R. § 1003.2(c)(2) and also INA § 240(c)(7).

Under the Constitution no person may be deprived of life, liberty or property without due process of law. The fundamental protections of the Fifth Amendment are universal in their application, to all persons within the territorial jurisdiction of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Once an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. *Zadvydas v. Davis*, 533 U.S. 678, (2001); *Yamataya v. Fisher*, 189 U.S. 86 (1903).

Procedural due process requires the government to afford a meaningful hearing and judicial review if it seeks to deprive a person of a liberty or property interest. The Supreme Court has recognized that deportation touches on important liberty issues and that aliens must be accorded due process. The Supreme Court has held that doubts are resolved in favor of the alien because deportation is a drastic measure and at times

the equivalent of banishment or exile. *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Rosenberg v. Fleuti*, 374 U.S. 449 (1962); *Matthews v. Eldridge*, 424 U.S. 319.

To be sure, the Attorney General retains discretion to decide whether petitioner will ultimately receive a status adjustment. An alien who satisfies the eligibility requirements to apply "does not have a right to the relief," but he is "eligible" to apply for it. *Succar vs Ashcroft*, 394 F. 3d 8 (1st Cir. 2005). In considering whether to exercise his discretion with respect to a particular application to adjust status, the Attorney General conducts an individualized determination, looking at such factors as family ties, hardship, and length of residence in the United States. *Elkins v.Moreno*, 435 U.S. 647 (1978). Considering that the law confers upon petitioner the right to apply for adjustment, he cannot be deprived thereof without running afoul of the due process clause of the constitution. The case must be remanded so petitioner is provided the opportunity to be heard by the agency upon whom the discretion to deny or to grant has been vested by law.

Removal proceedings is the sole procedure for determining whether an alien is inadmissible, deportable, or eligible for relief from removal. Removal proceedings generally require an Immigration Judge to make two findings: (1) a determination of the alien's removability from the United States, and (2) thereafter deciding whether the alien is eligible for a form of relief from removal. Adjustment of Status is a form of relief from removal.

Because his I-140 Immigrant Petition was approved and visa became current and available only during the pendency of his appeal with the US Court of Appeals, it was impossible for petitioner to raise the defense of adjustment of status before the IC and the BIA. No hearing had thus been held on this particular relief available to petitioner. Consequently, whether under 28 USC § 2347 (c) or § 2347 (b), remand

may properly be done. In view of the arguments set forth above, it was manifest error for the US Court of Appeals not to have done so.

2. The failure to consider that petitioner's evidence rises to the level of past persecution calls for the exercise of this Court'' supervisory power.

Petitioner in his testimony recited in detail the threats to his life and violence upon his person and his family in Indonesia carried out by the extremist and fanatical Jemaat Islamiah, a terrorist group under the watchlist of the US government, because of his membership in a group of government pilots and the Muhamadiyah Muslim Religious Sect a moderate Islam faith.

The evidence petitioner adduced includes a bomb threat on his aircraft, the burning of his aircraft, the robbing of their store, extortion and injuries suffered in the hands of members of the said group. In testifying about these incidents, petitioner was credible and consistent throughout. The testimony of the applicant if credible may be sufficient to sustain proof.

Petitioner's claim rises to the level of past persecution. Consequently, the burden shifted to the INS to show, by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution.The Service raised no objections to petitioner's testimony in open court and has not introduced any evidence to contradict the Respondent's claim or to suggest it is impossible. Unrebutted, the presumption stands.

Petitioner's evidence of past persecution was swept under the one year bar rule. But even if he is barred under the rule from seeking asylum, the same should nonetheless have been considered in his application for withholding of removal. In cases in which the applicant has established past

persecution, the burden of establishing that petitioner is not eligible for withholding of removal is shifted on the government. Since petitioner's evidence of past persecution stands unrebutted by the government, petitioner must be deemed to have fully established his eligibility for withholding of removal.

Under these circumstances, and in accordance with the United Nations Convention and Protocol relating to the Status of Refugees to afford a generous standard for protection in cases of doubt, petitioner should be granted the relief of withholding of removal.

CONCLUSION

WHEREFORE, it is respectfully prayed of the Honorable Court to grant the petition for a writ of certiorari.

Respectfully Submitted:

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANDI PALGUNADI,
Petitioner,

v.

ALBERTO GONZALES
Attorney General,
Respondent,

No. 06-1666

On Petition for Review of an Order of the
Board of Immigration Appeals
(A72-167-695)

Submitted: January 31, 2007

Decided: February 12, 2007

Before MICHEL, GREGORY, and DUNCAN,
Circuit Judges.

PER CURIAM:

Andi Palgunadi, a native and citizen of Indonesia, petitions for review of an order of the Board of Immigration Appeals adopting and affirming the Immigration Judge's (IJ) order denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. Palgunadi contends that he established eligibility for asylum. As the IJ concluded that the asylum application was untimely and no exceptions applied, we find that consideration of his asylum claim is barred. See 8 U.S.C. § 1158(a)(3)(2000).

Palgunadi also challenges the finidng that he failed to qualify for withholding of removal. "To qualify for withholding of removal, a petitioner must show that he faces a clear probability of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion."Rusu v. INS, 296 F.3d 316, 324 n. 13 (4th Cir. 2002) (citing INS v. Stevic, 467 U.S. 407, 430 (1984)). Having conducted our review, we conclude that substantial evidence supports the finding thatPalgunadi did not establish eligibility for withholding of removal.

We accordingly deny the petition for review. We deny Palgunadi's motion to remand and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
MAY 22, 2007

No. 06-1666
A72-167-696

ANDI PALGUNADI,
Petitioner,

v.

ALBERTO GONZALES
Attorney General,
Respondent,

ORDER

Petitioner has filed a petition for rehearing.
The court denies the petition for rehearing
Entered for a panel composed of Judge Michael, Judge Gregory, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor

CLERK

STATUTORY PROVISIONS INVOLVED

INA § 245 (i)

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien Physically present in the United States—
(A) who--
(i) entered the United States without inspection; or
(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of—

(i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or
(ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence x x x ...

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-
(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
(B) an immigrant visa is immediately available to the alien at the time the application is filed.

INA § 240 (c) (7) Motions to reopen.

(A) In general.-An alien may file one motion to reopen proceedings under this section , except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv) .
(B) Contents.-The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.
(C) Deadline.-
(i) In general.-Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

28 USC § 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.
(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—
(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.
(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and
(2) there were reasonable grounds for failure to adduce the evidence before the agency;
the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

PROVISIONS OF REGULATIONS INVOLVED

8 CFR § 245.2

Application (a) General--(1) Jurisdiction. An alien who believes he or she meets the eligibility requirements of section 245 of the Act or section 1 of the Act of November 2, 1966, and Sec. 245.1 shall apply to the director having jurisdiction over his or her place of residence unless otherwise instructed in 8 CFR part 245, or by the instruction on the application form. After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966 shall be made and considered only in those proceedings.

8 CFR §1003.2(c)(2)

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.